89-602

Supreme Court, U.S.
FILED
OCT 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

WRIT No:

SUPREME COURT OF THE UNITED STATES
OF AMERICA
OCTOBER, 1989 TERM

JOAN HARVILL : PETITIONER

v. :

MARY SPARROW : RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF THE DISTRICT
OF COLUMBIA, SMALL CLAIMS BRANCH
CASE No: 10890-88.

PETITION FOR WRIT OF CERTIORARI

JOAN HARVILL
Attorney at Law
1003 K. Street N.W.
Suite 203
Washington, D.C.
20001
(202) 638-3759

60 pp

QUESTIONS PRESENTED FOR REVIEW

1.

Petitioner's right to Due Process was violated under the Fifth and Fourteenth Amendment to the United States of America Constitution when the trial court imposed attorney's fees as Sanctions under District of Columbia Superior Court Rules of Civil Procedure Rule 11 without conducting a hearing on the issue of Sanctions prior to imposing the sum of $2,427.00 as attorney's fees as Sanctions in a Small Claims Matter where the underlying award was $427.00. And by its failure to consider the reams of documentary evidence that conflicted with the interested witness testimony of plaintiff presented on the underlying claim; without listening to oral arguments pertaining to the governing law and supporting facts of the underlying claim.

Petitioner's right to Due Process was violated under the Fifth and Fourteenth Amendments to the United States of America Constitution when the trial court imposed Sanctions under District of Columbia Superior Court Rules of Civil Procedure Rule 11[1] since the pleadings and averments of Petitioner were well grounded in law and supported by factual evidence and were not made in bad faith.

1. District of Columbia Superior Court Rules of Civil Procedure, Rule 11 is the same as Federal Rules of Civil Procedure, Rule 11.

LIST OF ALL PARTIES

1. Petitioner, Joan Harvill, was defendant in the Superior Court of the District of Columbia, Small Claims Branch.

2. Respondent, Mary Sparrow, was the plaintiff in the Superior Court of the District of Columbia Small Claims Branch.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	1
LIST OF ALL PARTIES	3
TABLE OF CONTENTS	4
TABLE OF AUTHORITIES	5
LIST OF OFFICIAL REPORTS	6
JURISDICTION	7
CONSTITUTIONAL PROVISIONS	9
RULES, REGULATIONS	9
STATEMENT OF THE CASE	12
FACTS OF THE CASE	12
PROCEEDINGS BELOW	28
REASONS TO GRANT WRIT CERTIORARI	30
CONCLUSION	45
APPENDIX	49
CERTIFICATE OF SERVICE	48

TABLE OF AUTHORITIES

	PAGE
1. Alyeska Pipeline Services Co., v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed.2d. 141 (1975).	37
2.Eash v. Riggin Trucking Inc., 757 F2d 557 (3rd Cir 1985 en banc).	33;36
3. Eggleton v. Vaughn, 45 A2d 362 (Mun. Ct. App. D.C. 1946).	42
4. Fellman v. Sarbov, 366 A2d 137 (D.C. App. 1976)	36
5. F.T.C. V. Alaska Land Leasing Inc., 799 F2d 507 (9th Cir. 1986).	45
6. General Federation of Womens' Clubs v. Iron Gate Inn, 537 A2d 1123, (D.C.App 1988).,	40
7. Knorr Brake Corp., v. Harbil Inc., 738 F2d 223 (7th Cir. 1984).	44;45
8. Miller Brewing Co., v. Brewery Worker's Union No 9, 739 F2d 1159 (7th Cir. 1984).	39;40
9. Miranda v. Southern Pacific Trans. Co., 710 F2d 516 (9th Cir. 1983).	45
10. Penwick v. Frank E. Basil Inc., of Delaware, 579 F. Supp. 160, affm., 744 F2d 878, 240 U.S.	

App. D.C. 254 (D.C.D.C. 1984) 34

11. Roadway Express Inc., v. Piper, 447 U.S. 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). 32

12. Rustler's Steak House v. Environmental Associates Inc., 327 A2d 536, (D.C. App. 1974). 36

13. Shrock v. Altru Nurses Registry, 810 F2d 658 (7th Cir. 1987). 44

14. United States v. Blodgett 709 F2d 609 (9th Cir. 1983). 45

15. United States v. Gypsom Co., 68 S. Ct. 525, 333 U.S. 364, 92 L.Ed. 746, reh., den., 68 S.Ct. 788, 333 U.S. 869, 92 L.Ed.1147 (U.S. App. D.C. 1948). 35

16. Fifth Amendment United States Constitution. U.S.C. Constitution. 44

17. Fourteenth Amendment United States Constitution. U.S.C. Constitution. 44

18. Superior Court Rules of Civil Procedure, Rule 11. 35

19. Superior Court Rules of Civil Procedure, Rule 8(e)(2). 38

LIST OF OFFICIAL REPORTS

1. Mary Sparrow v. Joan Harvill, S.C. No:10890-88 (D.C. Super. Ct. S.C. Feb. 21, 1989).

2. Joan Harvill v. Mary Sparrow, No: 1189-5 and 1189-10(D.C. Ct. App. June 12, 1989).

3. Joan Harvill v. Mary Sparrow, No: 1189-5 and 1189-10 (D.C. Ct. App. July 17, 1989).

JURISDICTION

The jurisdiction of the Supreme Court over this cause of action arises under U.S.C. Title 28 section 1651. See also, In the Matter of 620 Church St. Bldg. Corp.,299 U.S. 24, 57 S. Ct. 88, 81 L.Ed. 16, (1936).

This case arose in the Superior Court of the District of Columbia, Small Claims Branch. On January 27, 1989 the trial court rendered judgment for plaintiff, respondent, Sparrow. A Petition to Appeal the judgment was filed.

On February 21, 1989 the trial court entered an Order imposing Sanctions against defendant, Petitioner, Harvill herein.

A Petition to Appeal was filed.

The two Petitions to Appeal were decided adverse to Petitioner on June 12, 1989.

Reconsider En Banc.

The Petition for Reconsideration was denied on July 17, 1989.

CONSTITUTIONAL PROVISIONS AND COURT RULES

CONSTITUTION OF THE UNITED STATES OF AMERICA

FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, exceptin cases arising in the land or naval forces, or in the militia when in actual service in time of War or Public Danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor be deprived of life,liberty, or property, without due process of law; nor shall private property be taken for public use,without just compensation."

See, U.S.C. Constitution Amendment V.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION U.S.C. CONSTITUTION AMENDMENT XIV

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State Shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,liberty, or property,

without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

DISTRICT OF COLUMBIA SUPERIOR COURT RULES OF CIVIL PROCEDURE RULE 11:

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least 1 attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign a pleading, motion,or other paper and state party's address, and telephone number, if any. A name affixed by a rubber stamp shall not be deemed a signature. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harras or to cause unnecessary delay or needless increase in

the cost of the litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading motion, or other paper is signed in violation of this Rule, the Court, upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleadings, including a reasonable attorney's fee."

STATEMENT OF THE CASE

FACTS OF THE CASE:

1. Beginning in 1983 Respondent, Sparrow, began to perform investigative services for Petitioner's clients under the Criminal Justice Act wherein Petitioner, Harvill, acted as agent for the District of Columbia Government in arranging for said services on behalf of indigent defendants charged with criminal offenses wherein the government undertook to pay the investigative costs of Respondent, Sparrow, in said cases. 2. Petitioner, Harvill, in those cases would contact Respondent, Sparrow, inform her of what services were needed and act as agent directing what work was to be performed and approving of the government's payment for work satisfactorily performed.

3. Over time Petitioner, Harvill, began

to refer her private clients to Respondent,

Sparrow, in their private cases when investigative services were required.

4. Before Respondent, Sparrow, would undertake

to perform investigative services she required each private client pay a $50.00 retainer fee to be held by Petitioner, Harvill, until the work requested was performed and payment demanded. Gradually over the years from 1983 until 1988 a business arrangement evolved wherein Petitioner, Harvill, would inform the private client of the need for investigative services, of the availability of Respondent, Sparrow, to perform same at the rate of $20.00 per hour provided a $50.00 retainer fee were paid for Respondent, Sparrow, in advance to be held in trust for the aforesaid costs for client

u

ntil the work requested were performed and payment demanded. If the investigative services exceeded the initial cost of $50.00 Respondent, Sparrow, sent a bill for ner services to Petitioner, Harvill, for each client for which she performed work. Petitioner, Harvill, then forwarded that bill to each client who in turn paid the costs on a monthly payment plan that had been extended by Respondent, Sparrow. Payments were made through the law office of Petitioner, Harvill.

5. These individual agency contracts were verbal agreements with Petitioner, Harvill, the agent, acting for the clients who were the disclosed principals to the contracts between the clients and Respondent, Sparrow.

6. In 1986 Petitioner, Harvill, began to engage the services of Respondent, Sparrow, for certain indigent clients who were not able to pay the investigative costs of their cases. In those certain, enumerated cases Petitioner, Harvill agreed with Respondent, Sparrow, that Petitioner, Harvill, would advance to these especially designated clients the costs of Respondent, Sparrow's, investigative services. The costs of these services were paid on a monthly payment plan extended by Respondent, Sparrow.

7. A disagreement arose between Petitioner, Harvill, and Respondent, Sparrow, over the overrun of costs on certain cases.

Whereupon Respondent, Sparrow, demanded all cases outstanding must be paid in full within 30 days.

8. On May 11, 1988 Respondent, Sparrow,

sued Petitioner, Harvill, in District of Columbia Superior Court, Small Claims Division for $789.00. Of that sum only $82.22 was owed by Petitioner, Harvill, on a case that Petitioner, Harvill, had agreed to advance the costs of investigation on an indigent client's case to Respondent, Sparrow.

9. On May 16, 1988 Petitioner, Harvill, paid to Respondent, Sparrow, a check for $82.22, and written across the face of that check by Petitioner, Harvill were the words "Adv. by law office Dunn v. WMATA final payment acct's pd. by atty. paid in full." On May 21, 1988, Respondent, Sparrow, negotiated that check, and thereby accepted full and final payment by petitioner, Harvill, of any sums of money owed by her that were in dispute during the pendency of the litigation.

10. The balance of the money allegedly

owed was owed to Respondent, Sparrow, by two private clients who had agreed to use the investigative services of Respondent, Sparrow. Clients who had paid to Respondent, Sparrow, her required $50.00 retainer fee and who had made monthly payments on their accounts with her. One of the clients, Mr. Crummer, after paying $200.00 for investigative services refused to make any further payments to Respondent, Sparrow, on the basis that she overcharged him to take measurements of a street and pictures of the street. The other client, Mr. Higgins had been making monthly payments over a two year period to Respondent, Sparrow, on his two accounts with her, and continued to do so during the pendency of the litigation in Small Claims.

11. Prior to and during the course of the Small Claims litigation,

Respondent, Sparrow, and her attorney began to contact the various clients of Petitioner, Harvill, and inform them that attorney Harvill was requiring them to pay their costs of suit when Petitioner, Harvill, was required to pay said costs. In addition, Respondent and her attorney attempted to elicit from the clients of Petitioner, Harvill, information that the clients had paid the investigative costs and that the Petitioner, Harvill, had pocketed the monies and used same for her own purposes. Without complying with the Small Claims Rules of Court governing discovery Respondent, Sparrow, and her attorney noticed the deposition of Petitioner, Harvill, and of her clients, and demanded by letter and telephone calls that the various clients and Petitioner, Harvill, repond to Respondent, Sparrow's,

discovery requests. At the time of the bringing of the action only 2 former clients of Petitioner, Harvill, still allegedly owed monies to Respondent, Sparrow, yet many other clients were contacted and discovery demands made upon them and their cases that were still pending in the courts.

12. On June 13, 1988 Petitioner, Harvill, filed an Answer to the Small Claims complaint and alleged as defenses (1) Failure to join necessary party defendants, Mr. Crummer and Mr. Higgins, who by June 13, 1988 were the only persons who allegedly owed any money to Respondent, Sparrow. (2) Accord and Satisfaction, (3) Fraud in the Inducement to Make a Contract, (4) Failure to state a claim upon which relief could be granted. (5) Failure to be duly licensed. (6) A counter claim alleging (a) agency

contracts in which the agent, Harvill, was not liable for the breach of the two disclosed principals.(b) Breach of the verbal agency contracts by Respondent, Sparrow, based on her charging more for her services than originally agreed to and breach by her demand of full payment on each account within 30 days in violation of her agreed to monthly payment plan.

TRIAL PROCEEDINGS:

13. On January 27, 1989 the Small Claims case came on to be heard at trial in the civil division where it had been certified. Petitioner, Harvill, waived a demand for jury trial and the case was heard before a single Judge.

14. Respondent, Sparrow, testified regarding her allegations and was cross examined and documentary evidence of letters, which constituted written proofs of the verbal agreements between

Petitioner, Harvill and Respondent, Sparrow, were utilized in cross examination of Respondent, Sparrow, wherein Respondent, Sparrow, testified the documents were authentic and represented communications between the parties over their five years of doing business in the manner described herein. The $82.22 cancelled check which proved the defenses of accord and satisfaction was introduced into evidence, and cancelled checks negotiated by Respondent, Sparrow, drawn on Petitioner's, Harvill's, client trust account which showed Mr. Higgins had made monthly payments to Respondent, Sparrow, over a two year period were introduced into evidence and Respondent, Sparrow, testified she received said checks and negotiated them and worked on behalf of Mr. Higgins for two years.

15. Mr. Crummer testified at the trial:

that he had agreed to pay his own costs of suit, and a written contract memoralizing that agreement was introduced into evidence; that he had paid a $50.00 retainer fee to Respondent, Sparrow; that at one point he was advised by Petitioner, Harvill, that the investigator's services would not be provided since he had not paid the investigator's bill; that after that warning he had made other payments to Respondent, Sparrow, for her investigative services during the pendency of his case until she overcharged him for taking pictures and measurements of a street whereupon he refused to pay any further monies on his account.

16. Mr. Higgins testified at the trial: that he had agreed to use the services of Respondent, Sparrow; that he had agreed to pay his own costs of suit; that he had paid Respondent, Sparrow,

the $50.00 retainer fee demanded by her; that he had paid on his accounts with her for over two years monthly payments totaling in excess of $1,000.00.

17. Petitioner, Harvill, testified to the fact: that she had negotiated contracts for her clients with Respondent, Sparrow, obtaining from them the retainer fee of $50.00 which was placed in a client trust account to be used to pay the investigator's bill when presented; that she had placed all monies paid by clients for Respondent's services in a client trust account and used said monies to make the monthly payments required by Respondent, Sparrow, on the varous accounts; that over the course of years from 1983 until 1988 the parties had conducted business in the manner described herein via verbal agreements reached between them; that Petitioner, Harvill, made it clear

to Respondent, Sparrow, that she would pay for the investigative costs of certain designated indigent clients only and that the other clients were responsible for their own costs; that in the case of Mr. Crummer, Respondent, Sparrow, was instructed at one point to stop any investigative services since Mr. Crummer was not paying his bill for same.

18. Petitioner, Harvill, attempted to introduce an affidavit from another client who had been contacted by Respondent, Sparrow, and her attorney which set forth the agency relationship contract between Respondent, Sparrow, and that client, but the trial court refused to permit the evidence on the basis the affidavit was not prepared by the attorney representing Respondent, Sparrow, even though it was given under oath by the affiant.

19. In spite of the testimony of Mr. Crummer and Mr. Higgins, who were not parties to the litigation; the authenticated, documentary evidence; the testimony of Petitioner, Harvill, the trial court based on the contradictory, inconsistent testimony of Respondent, Sparrow, found there was no privity of contract between Mr. Crummer and Mr. Higgins; that the contracts were soley between, the agent, Harvill, and Respondent, Sparrow; that there was no accord and satisfaction as proven by the check marked full and final payment of $82.22; that there was no need to examine the reams of authenticated, documentary evidence and cancelled checks introduced by Petitioner, Harvill; that unless Petitioner, Harvill, produced documents from Respondent, Sparrow, corroborating Petitioner's documents, Petitioner's

documents were not believable documents and would not be considered by him.

20. The trial court found for Respondent, Sparrow, a judgment in the sum of $427.00.

21. Attorney for Respondent, Sparrow, asked leave of court to file a Motion for Rule 11 Sanctions against Petitioner, Harvill, which Motion was granted.

22. Respondent, Sparrow, filed a Motion for Sanctions which was opposed by Petitioner, Harvill. The court decided the Motion in chambers without the parties being present, and without affording Petitioner, Harvill, an opportunity for a Hearing, to offer evidence in her behalf or oral argument against the Motion. The trial court awarded Respondent, Sparrow, attorney's fees in the sum of $2,427.00 as Rule 11 Sanctions.

23. In arriving at the attorney fee award the trial court reasoned that

some of Petitioner's defenses had merit and some did not and reduced Respondent's demand for over $5,000.00 in attorney's fees by choosing which defenses to the claim were meritorious and deducting the Respondent's claim for attorney's fees from those claims. See, the trial court's opinion attached in the appendix.

PROCEEDINGS BELOW

1. On or about May 11, 1988 Respondent, Sparrow, filed a complaint in the District of Columbia Superior Court Small Claims Division against Petitioner, Harvill, sounding in breach of contract for failure to pay on 3 accounts.

2. On June 13, 1988, Petitioner, Harvill filed an Answer with Counterclaim and request for a jury trial.

3. On January 26, 1989 the case came on for trial in the District of Columbia Superior Court Civil Division before Honorable Judge Graae sitting without a jury.

4. On January 27, 1989 Judge Graae rendered his decision in favor of Respondent, Sparrow, in the sum of $427.00.

5. By February 1, 1989 a Petition to Appeal the January 27, 1989 Judgment was filed with the District of Columbia

Court of Appeals.

5. On February 6, 1989, Respondent, Sparrow filed her Motion for Sanctions.

6. On February 16, 1989, Petitioner, Harvill, filed an Opposition to the Motion for Sanctions.

7. On February 21, 1989 Judge Graae sitting in chambers without the parties or their attorneys being present and without affording an opportunity for a hearing, to cross examine witnesses or offer evidence in their behalf, entered an order awarding Sanctions to Respondent, Sparrow, as attorney's fees in the sum of $2,427.00 against Petitioner, Harvill.

8. On February 28, 1989 an Application to Appeal the Sanction Order was filed by Petitioner, Harvill.

9. On June 12, 1989 the Applications to Appeal the Judgment and Sanctions Order were denied by the District of

Columbia Court of Appeals.

10. On June 26, 1989 Petitioner, Harvill, filed a Petition to Reconsider En Banc.

11. On July 17, 1989 the Petitioner's Application to Reconsider En Banc was denied.

12. The Petition for a Writ of Certiorari is filed timely within 90 days.

REASONS TO GRANT THE WRIT OF CERTIORARI

1.

A PARTY WHO HAS BEEN DENIED A CONSTITUTIONAL RIGHT ARISING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO DUE PROCESS OF LAW BY A STATE COURT OF LAST RESORT WHEN THE STATE COURT'S DECISION CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR FEDERAL COURTS OF APPEALS IS ENTITLED TO A GRANT OF AN APPLICATION FOR A WRIT OF CERTIORARI.

LEGAL ARGUMENT

1.

In this case the District of Columbia Superior Court, Civil Division was the State Court of last resort that rendered the decisions at issue in

this Small Claims Case since the District of Columbia Court of Appeals declined to entertain the applications to appeal the Judgment and Sanction Order rendered. A judgment that was contrary to governing law, and an Order imposing attorney's fees as Sanctions which was done in violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution since the Order imposing Sanctions was made without the opportunity for a hearing and without opportunity to offer evidence or legal arguments against the imposition of Sanctions imposed under District of Columbia Superior Court Rules of Civil Procedure, Rule 11.

It is a basic premise of Constitutional Law that a citizen of the United States may not be deprived of property without due Process of Law. Due Process of

Law requires that a person be given an opportunity for a hearing to present evidence and legal arguments in their own behalf on the issue of imposition of sanctions. See, Roadway Express Inc., v. Piper, 447 U.S. 765- 767, 100 S. Ct. 2455, 2464, 65 L.Ed. 2d 488 (1980) where the Supreme Court held an Opportunity to be heard is required before sanctions can be imposed on an attorney.

In addition the Supreme Court set forth the criteria to be used in imposing sanctions against an attorney which are: A litigant cannot recover his counsel's fees unless the opposing party has acted in "bad faith".

The Supreme Court then went on to describe "bad faith" as: A wilful disobedience of a court order or acting vexatiously, wantonly or for oppresive reasons.

See also, Eash v. Riggins Trucking

reasons. See also, Eash v. Riggins Trucking Inc., 757 F2d 557, 570-71, (3rd Cir. 1985 en banc) where the appellate court of the Third Circuit teaches:

> "Fundamental Fairness may require some measure of prior notice to an attorney that the conduct that he or she contemplates undertaking is subject to descipline or sanctions by a court. Consequently the absence for example, of a statute, Federal Rule, ethical cannon, local rule or custom, court order or perhaps most pertinent to the case at hand court admonition, proscribing the act for which a sanction is imposed in a given case may raise questions as to the sanctions validity."

In this case the trial court in his order imposing sanctions opined certain of the petitioner's pleadings were signed in "bad faith" with no basis in fact in violation of S.C.R. Rule 11." At the underlying trial held there were innumerable authenticated documents introduced into evidence which constituted the facts upon which

petitioner's pleadings were based, but the trial judge who imposed the sanctions refused to look at the documents and/or consider them unless the Respondent had introduced an exact duplicate of the document into evidence. In this case the evidence supporting the fact that the verbal contracts at issue were agency contracts and that petitioner was an agent acting for a disclosed principal and therefore under established case law, see, Penwick v. Frank E. Basil Inc., of Delaware., 579 F. Supp. 160, 164-165, affm., 744 F2d 878, 240 U.S. App. D.C. 254 (D.C. D.C. 1984), was not liable for the breach of the principals to the agency contracts was shown by the documentary evidence introduced and attested to by two independant witnesses, Mr. Crummer and Mr. Higgins. Yet the trial court concluded there was no

evidence of the agency contract, and instead relied solely on the interested witness testimony of Respondent, Sparrow. Where contemporaneous documentary evidence conflicts with the testimony of an interested witness, the interested witnesses' testimony is to be discounted. See, United States v. Gypson Co., 68 S. Ct. 525, 333 U.S. 364, 92 L. Ed. 746, reh. den. 68 S. Ct. 788, 333 U.S. 869, 92 L. Ed. 1147 (U.S. App. D.C. 1948), where the Supreme Court of the United States teaches in its holding it is reversible error to credit an interested witnesses' testimony that conflicts with documentary proof. In this case the trial court used S.C.R. Rule 11 as the criteria upon which his Sanction Order was based. However that local court rule provides that sanctions may only be imposed where the pleadings are not

well gounded in law or supported by facts. In this case there were a multitude of evidentiary and testimentary facts supporting petitioners' pleadings and the counterclaim. For a few examples the main defenses of agency contract law and accord and satisfaction are so well supported by long accepted case law the facts of the instant case could have been taken from horn book law. See, Rustler's Steak House v. Environmental Associates Inc., 327 A2d-536, 539 (D.C. App. 1974); Fellman v. Sarbov, 366 A2d 137 (D.C. App. 1976). As stated in Eash v. Higgins Trucking Inc., supra, before Sanctions can be imposed a litigant must have notice the act contemplated is violative of court rule or order or statute. In this case the actions taken by Petitioner in defending against a legal action brought against her

were not violative of any court order, court rule or statute. See, Alyeska Pipeline Services Co., v. Wilderness Society, 421 U.S. 240 260, 95 S. Ct. 1612, 1623, 44 L.Ed. 2d 141 (1975) where the Supreme Court held sanctions should not be awarded without notice or an opportunity to be heard. Since the pleadings of Petitioner were well grounded in governing law and supported by evidence there was no basis for the trial court to impose sanctions under Rule 11. Had a Hearing been afforded to Petitioner these facts could have been pointed out to the trial judge. The trial judge in his opinion stated some of petitioner's defenses were pled in bad faith, but does not specify which defenses were deemed to be made in "bad faith". Then the trial court went on to pick over the Respondent's

demand for attorney's fees choosing only certain charges for which she would be compensated and deleted other claims for fees based on the finding "some" of the defenses were made in bad faith. According to local pleading rules a litigant can plead in the alternative different theories of recovery or defense. See, District of Columbia Superior Court Rules of Civil Procedure Rule 8(e)(2) which provides:

> "(2) A party may set forth 2 or more statements of a claim or defenses alternatively or hypothetically, either in 1 count or defense or in separate counts or defenses. When 2 or more statements are made in the alternative and 1 of them if made independently would be sufficient, the pleading is not made insufficient by the

insufficiency of 1 or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritme grounds..."

Petitioner in her Answer pled alternative defenses pursuant to this rule which is identical to F.R.C.P. Rule 8. If the trial court was of the opinion Petitioner failed to meet the burden of proof as to some of the defenses raised, it is not a grounds to impose sanctions since all defenses were supported by law and facts. In Miller Brewing Co., v.Brewery Worker Local Union No 9, 739 F2d 1159,1168 (7th Cir. 1984), a Federal Court of Appeals Case which holding is opposed to the case relied upon by the trial

court in apportioning attorney's fees because of a finding some of the defenses were made in bad faith while others were not, See, the trial court's Order in the appendix for the District of Columbia Court of Appeals case that held an apportionment of attorney's fees for only those defenses made in bad faith was acceptable, General Federation of Women's Clubs v. Iron Gate Inn, 537 A2d 1123, 1128 (D.C. App. 1988) and compare it Miller Brewing Co., v. Brewery Worker's Local Union No 9, supra, where the appellate court set forth the general rule, it is not worthwhile:

> "to divide a suitor's claims (or defenses) into frivolous and non frivolous, and award attorney's fees in respect to the frivolous claims but not the others".

In that case the Federal Appeals Court held where some of the claims or defenses are meritorious and not made in bad faith while others are frivolous,

there is no right to an attorney fee award due to the frivolous claims or defenses.

However in this case the Superior Court Judge sitting without a jury did pick and choose among defenses declaring some frivolous, ie., made in bad faith, and some not, and awarded an attorney fee as sanctions based on those he found to be made in bad faith. Here there is a conflict between a State Court of last resort and a Federal Court of Appeals Decision which were decided directly opposite on the same issue. Which situation mandates the Writ of Certiorari be granted.

In cases where a judge sits without a jury and imposes sanctions upon an attorney the admonition stated in Nelken, Sanctions Under Rule 11-Some "Chilling" Problems in the Struggle

Between Compensation and Punishment

is well taken:

> " a judge awarding sanctions is often advocating the correctness of his decision and is likely to do so convincingly...(a court in an opinion)"has the power to make an attorney's argument seem frivolous."

In the pending case the trial court did not permit oral argument pertaining to the governing law at the trial on the underlying case. Had he done so or had he permitted a hearing before the imposition of sanctions Petitioner could have pointed out the governing law which the trial judge should have used as a guide, much as a jury does, in determining whether the petitioner carried his burden of proof at the underlying trial and/or shown the trial court that the pleadings were well grounded in law before sanctions were imposed.

See, Eggleton v. Vaughn, 45 A2d 362

(1946 Mun. Ct. App. D.C.), where the appellate court held in a case where the trial court refused requested rulings regarding the governing law:"

> "There was evidence tending to establish the defense and that the trial court in determining questions of fact must recognize and be guided by correct and applicable principals of law. A court sitting without a jury acts in a two-fold capacity, performing the function of both judge and jury. In such a case it is just as important that the court in approaching its fact finding function be guided by correct principals of law as it is that in a jury case the jury be correctly instructed on the legal principles which are to guide them in their deliberations."

The appellate court in that case reversed the trial court's decision for the court's failure to take into account the governing law. So too in this case the trial court refused to hear oral arguments pertaining to the governing law at the underlying trial and refused to permit a hearing before imposition of sanctions and was thus deprived of any guide as to the governing

law at both stages which culminated in the rendition of an unfair verdict and in the imposition of sanctions for legal actions that were not in bad faith since not violative of any court rule, statute, regulation or court order.

The right to a Hearing before imposition of Sanctions against an attorney or litigant cannot be questioned as it arises from the Fifth and Fourteenth Amendments to the United States Constitution's Due process Clause. See, Shrock v. Altru Nurses Registry, 810 F2d 658 (7th Cir. 1987); In Knorr Brake Corp. v. Harbil Inc., 738 F2d 223 (1984 7th Cir), the appellate court of the 7th Circuit set forth the applicable rule when imposing Sanctions in a case where counsel's alleged misconduct is the filing and arguing of a claim as:

"It is not sufficient that the claim be found meritless, the claim must be without plausible legal or factual basis and lacking in justification."
In F.T.C. v. Alaska Land leasing Inc., 799 F2d 507 (9th Cir 1986), the appellate court held:

"Due Process further requires that parties subject to sanctions have sufficient opportunity to demonstrate that their conduct was not undertaken recklessly or wilfully..."
"Due Process requires opportunity to prepare a defense and explain questionable conduct at a hearing."
See also, Miranda v. Southern Pacific Transportation Co., 710 F2d 516 (9th Cir 1983); United States v. Blodgett, 709 F2d 608 (9th Cir. 1983).

CONCLUSION

In this pending case, the trial judge sitting alone in chambers without having afforded the party a hearing imposed attorney's fees of $2,427.00 in a Small Claims Case where the underlying verdict was only $427.00. The Petitioner's Constitutional Rights

were violated by the trial court's refusal to consider the documentary evidence at the underlying trial, the trial court's wrongful exclusion of evidence, and then the subsequent erroneous conclusion there was no evidence offered to support some of the defenses and therefore sanctions were called for under Rule 11. This Alice in Wonderland reasoning of the trial court cannot be condoned or upheld in this very sensitive area of imposition of sanctions against an attorney who zealously defends against a claim.

The appellate court in Knorr Brake Corp., v. Harbil Inc., supra, sets forth the governing rules of imposing sanctions against attorneys to protect three societal interests as:

> "(1)encouraging free access to the courts. (2) right of the client in obtaining legal counsel who

otherwise might be chilled from taking a close case.

(3) Lawyer's ethical obligation to represent his or her client zealously within the bounds of the law."

The alternative defenses and counterclaim pled by Petitioner when sued under agency contracts for the debts of the principals were well grounded in established case law and supported by documentary and testamentary evidence. The imposition of sanctions for attorney's fees was not warranted by the facts of the case and was done in violation of Constitutional Rights guaranteed by the Fifth and Fourteenth Amendment and must be reversed along with the underlying Judgment.

Wherefore, for all the reasons set forth herein Petitioner respectfully moves the Court to grant the Petition for the Writ of Certiorari.

DATED: October 12, 1989

SIGNED: Joan Hamill

Joan Harvill
Attorney at Law
309112
1003 K. Street N.W.
Suite 203
Washington, D.C. 20001
(202) 638-3759

CERTIFICATE OF SERVICE:

I certify a copy of the Petition for Writ of Certiorai was mailed postage pre-paid to the attorney for Respondent, Phillip Kissel, at 1000 16th Street N.W., Washington, D.C. 20036 on October 16, 1989.

SIGNED: Joan Harvill

Joan Harvill

APPENDIX

APPENDIX INDEX

	PAGE
ORDER IMPOSING SANCTIONS	51
ORDER DENYING APPLICATION TO APPEAL	55
ORDER DENYING PETITION FOR RECONSIDERATION EN BANC	57

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION
Small Claims and Conciliation Branch
(Filed Feb 21 1989 Clerk Superior

Court of the District of Columbia

Small Claims Branch)

MARY SPARROW :

Plaintiff

v.

:SC:10890-88

JOAN HARVILL

Defendant :

ORDER IMPOSING SANCTIONS

This matter is before the Court on the Plaintiff's Motion for Rule 11 Sanctions and the Defendant's Opposition thereto. Because the Defendant filed pleadings which were signed in violation of Super. Ct. Civ. R. 11 (1988) ("Rule 11"), the motion is granted in part.

This case was tried to the Court on January 26 and 27, 1989. After

the evidence was presented, and upon the Plaintiff's oral Motion, this Court concluded that the Defendant's Counterclaim and certain of her defenses were pleaded in bad faith with no basis in fact, in violation of Rule 11. The Plaintiff was therefore given leave to file the instant Motion, The Plaintiff is not entitled to attorney fees for the entire course of litigation, only for fees caused by the sanctionable pleadings. General Federation of Women's Clubs v. Iron Gate Inn, 537 A.2d 1123, 1128 (D.C. App. 1988). However the Affidavit of Attorney's Fees and Costs Incurred by Plaintiff does not provide sufficient detail for this Court to trace all of the attorney's billings to specific pleadings.

The Plaintiff seeks fees for a total of 79.90 hours of attorney time,

From this amount, the Court subtracted 21.70 hours for time specifically attributable to non-sanctionable causes (including time which would have been expended regardless of the Defendant's pleadings). A copy of the Plaintiff's affidavit is attached hereto as an Appendix, with these subtracted hours indicated as such. The balance of 58.20 hours was then halfed, leaving 29.10 hours of attorney fees for which this Court finds the Defendant to be liable. Plaintiff's attorney's hourly rate of $75.00 appears reasonable, was not challenged, and is used as the "lodestar". This method is admittedly crude, but approximates the amount of attorney fees this Court believes were "reasonably incurred to meet (the Defendant's) groundless, bad faith (pleadings)." Id. (quoting Synanon Foundation, Inc., v. Bernstein,

517 A2d 28 (D.C. App. 1986).

WHEREFORE, it is this 21st day of February, 1989,

ORDERED, that the Plaintiff's Motion for Rule 11 Sanctions be, and the same hereby is, GRANTED IN PART: and it is further,

ORDERED, that Judgement be entered for the Plaintiff for Attorneys Fees and Costs in the Amount of Two Thousand Four Hundred and Twenty Seven Dollars ($2,427.00).

Steffen W. Graae
Judge
(signed in chambers)

copies to:
J. Philip Kessel, Esq.
300 Solar Building
1000 16th Street N.W.
Washington, D.C. 20036

Joan Harvill, Esq.
1003 K. Street N.W.
Suite 203
Washington, D.C. 20001

DISTRICT OF COLUMBIA
COURT OF APPEALS

(District of Columbia
Court of Appeals
Filed June 12, 1989

Clerk
Nos. 1189-5 and 1189-10

JOAN HARVILL, Applicant,

v.

SC10890-88

MARY SPARROW, Respondent.

BEFORE: Belson, Terry, and Steadman, Associate Judges.

ORDER

On consideration of the application for allowance of appeal from the Small Claims and Conciliation Branch of the Superior Court, the motions of applicant to stay applications, and the opposition of respondent thereto, it is

ORDERED that the applications and the motions for stay are denied.

PER CURIAM

Copies to:

Honorable Steffen W. Graae

Clerk, Superior Court

Ms. Joan Harvill
1003 K. Street N.W.
Suite 203
Washington, D.C. 20001

Philip J. Kissel, Esquire
1000 16th Street N.W.
Suite 300
Washington, D.C. 20036

acq

DISTRICT OF COLUMBIA
COURT OF APPEALS

(District of Columbia
Court of Appeals
Filed July 17, 1989
_____)
Clerk

Nos. 1189-5 and 1189-10

JOAN HARVILL, Applicant,

v.

SC10890-88

MARY SPARROW, Respondent.

BEFORE: Rogers, Chief Judge; Mack, Newman, Ferren, Belson, Terry, Steadman, Schwelb, and Farrell, Associate Judges.

ORDER

On consideration of applicant's petition for reconsideration en banc; and it appearing that no judge of this court has called for a vote on the petition for reconsideration en banc, it is

ORDERED that the petition for

reconsideration en banc is denied.

PER CURIAM

Copies to:

Honorable Steffen W. Graae

Clerk, Superior Court

Ms. Joan Harvill
1003 K. Street N.W.
Suite 203
Washington, D.C. 20001

Philip J. Kessel, Esquire
1000-16th Street N.W.
Suite 300
Washington, D.C. 20036

sl